No. 13246

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation,

Appellant,

vs.

JOSEPH J. SEAMAS,

Appellee.

APPELLANT'S OPENING BRIEF.

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I.
BASIS OF JURISDICTION.

The above entitled case was brought pursuant to the Federal Employers Liability Act (45 U. S. C., Sec. 51 *et seq.*). The United States Court of Appeals has jurisdiction of the appeal from the judgment rendered in favor of the plaintiff and against the defendant pursuant to the Judicial Code, Title 28 U. S. C., Sections 1291-4. The complaint, at page 4 of the transcript of record shows that the action was brought under the provisions of the Federal Employers Liability Act.

II.
SUMMARY OF FACTS.

Appellee was a 37 year old switchman, employed by defendant, who claimed injury at Stockton, California, December 9, 1950. He and other members of a switching crew were switching cars during hours of darkness. Plaintiff claimed he heard a brake on a car sticking and told his foreman that he was going to climb on the car to release the brake and that the foreman said to go ahead. The engine foreman and another switchman were passing signals on the south side, or engineer's side of the train. Plaintiff climbed on to the car on the north side at which time the foreman permitted the cars attached to the engine to couple into the car on which plaintiff was climbing, knocking plaintiff off the car. It is customary to work on the south side, or the engineer's side of the train unless permission of the foreman to climb on the cars on the north side is given. The foreman disclaimed any knowledge that plaintiff intended to climb on the car at all. A brief abstract of facts with references to the record follows:

III.
ABSTRACT OF RECORD.

Plaintiff, a 37 year old switchman in the employ of the defendant Santa Fe Railway [R. 29] at Stockton, California, claimed he was injured December 9, 1950 [R. 32] while working as part of a switch crew under direction of the foreman, Mr. L. A. Mahan. Other members of the crew were Engineer Marrs, Fireman Strain, Switchman (pin-puller) Weith and the plaintiff, who was working as a switchman [R. 34-35].

According to plaintiff the injury occurred about 10:00 P. M. on a dark foggy night [R. 37] after the crew returned from supper [R. 40], the crew coupled the engine onto five cars and proceeded with them to No. 9 switch stand where plaintiff stepped off the cars and lined the No. 9 switch [R. 42]; then he walked to track No. 3 to a point marked S-1 on Exhibit 3, following a path labeled S-2 on Exhibit 3, then he lined a switch at No. 3 track and walked to track No. 5 labeled S-3 on Exhibit 3 [R. 43, 88].

Summarizing his testimony, the train was situated on a track running generally east and west. Plaintiff was east of the cars and engine. One car was kicked by the engine toward No. 9 track; however, it did not roll far enough and when the foreman kicked another car which was supposed to go into No. 6 track, it coupled into the car which had been kicked toward No. 9 track. Plaintiff then proceeded to the north side of the second car, the car on the east of the two cars that were coupled together, and told the foreman who was on the south side of the car, " 'I am going to go up and check that brake or see whether the brake was set' and he says 'Okay, Kid, go ahead' " [R. 42-48]. Foreman Mahan was ten to twelve feet away on the south side of the cars and two cars were separated from the engine and three other cars by a distance of about 150 feet [R. 90-91]. Plaintiff then climbed up the ladder on the northwest end of the western-most of the two cars. He testified that, "As I get up to the brake platform with my right foot, I was knocked off."

Plaintiff was carrying a lantern and had climbed up the ladder on the north side of the western-most car to a position ten to twelve feet above the ground. He fell in rough dirt and was able to get up right away, although

in pain, feeling a burning sensation from his knees to the small of his back. According to plaintiff, the foreman asked him if he was hurt and he replied that his legs and back were sore [R. 54-55]. He remained on the job from thirty to forty minutes, drove his automobile home and about 12:00 A. M. that night, called a doctor [R. 56-59, 85]. He saw a doctor daily until January 2 or 3, 1951, obtaining treatment including laying on a hard bed, heat treatments, pills and shots [R. 61-62]. On January 3, he was hospitalized and his legs were put in traction for about 12 days. He remained in the hospital until January 19, 1951 [R. 64-65]. The doctor prescribed a corset which fit around the small of his back. He has been wearing it since the accident and he continued to see the doctor nearly every day for a month and a half, then every day for a month and a half for heat and rubbing treatments [R. 66-68.] For about four to five months he used a cane and finally quit using it at the suggestion of his doctors [R. 69-70].

Plaintiff thought that the diesel engine and three cars struck the two cars on which he had climbed "pretty hard" [R. 70].

At the time of trial he was experiencing pain in the back of his legs and in the small of his back, could not walk freely, could not walk up stairs without pain and had not worked since the injury [R. 73-75]. His earnings at the time of the injury were $12.26 per day, as more specifically set forth in Exhibit 2 [R. 76-78]. Plaintiff had 14 years as a switchman [R. 82].

Plaintiff acknowledged that the engineer operates on the right-hand side of the engine, on the south side, and that signals between the foreman and switchman are passed on the south side of the train; nevertheless, he

climbed on to the train on the north side out of sight of the switchman and engine foreman [R. 91-92]. The track curved so that in order to see the engineer and pass signals it was necessary to be on the south side of the cars and the only way the engineer or fireman could know anyone was on the north side of the cars would be by a signal passed on the south side [R. 93-94]. Switchman Weith was at the west end of the three cars attached to the engine [R. 95].

Plaintiff climbed up the side ladder of the car and crossed over to the end ladder and was placing his right foot on the brake platform which is two or three feet below the top of the car when he was knocked off [R. 102-105]. From his position he was unable to see the lantern of Foreman Mahan or Switchman Weith [R. 107]. He could have climbed up the cars on the south side and thereby have remained within view of other crew members at all times [R. 107-108].

Switchman Weith testified that his job was to follow the engine to make couplings and uncouplings [R. 128-129]. He was standing at the position marked "W" on Exhibit 3 and Foreman was west of him carrying a lantern [R. 133]. The three cars attached to the engine hit the two cars on which plaintiff had climbed [R. 135]; the coupling was unusually hard and would have required a person to have a firm hold to prevent his being knocked off [R. 144].

Mr. Strain, employed as a fireman, was operating the engine at the time of the accident [R. 149-153]. He responded to a kick signal given by lantern [R. 161-163] and "rammed into something hard." He was not aware

that Mr. Seamas was in the area but was not going very fast because he got a slow—easy signal to back up—maybe three to four miles per hour [R. 164-165]. It is customary to receive a stop signal just before a kick is made but on this occasion he received it after the impact [R. 167-168]. Couplings generally are held to four miles per hour or less [R. 173]. This witness' memory was refreshed that he was going about two and one-half miles per hour at the time of the coupling [R. 175; see Ex. B]. Plaintiff showed Mr. Strain his legs where they were skinned [R. 170 but did not mention injuring his back the night of the accident [R. 178].

Trainmaster Wilson testified that the Ajax brake such as that plaintiff intended to release could be released without climbing on the brake platform and can be released from the top of the car [R. 273-276].

Foreman Mahan testified that it was plaintiff's duty to line up switches when he had no cars to ride, set brakes and to assist out in the field [R. 282-283]. He defined a kick move as a quick move [R. 284]. Mahan did not give plaintiff permission to climb on either of the two cars and it was not necessary for a man to get on either car because it is just as well to kick a car with a slight brake on it, if it had one on at all. Nor did Mahan see plaintiff anywhere in the vicinity of the two cars at any time; did not know where he was but supposed he was on the lead track since he had been given a list of the tracks the crew was going to use and was supposed to be lining up switches [R. 286-288]. It is

customary for all of the crew to work on the same side of the engine and cars, on the south side of the track, where everyone can see one another and signals can be passed to the engineer. Foreman Mahan did not give plaintiff permission to get on the cars on the north side of the cars [R. 288-289]. Had Foreman Mahan known that plaintiff was climbing on the cars on the north side of the train he would not have coupled into the cars until he knew plintiff was in a safe place [R. 289-290].

After the accident, plaintiff showed Mahan a minor scratch on his leg which plaintiff claimed he sustained when he was knocked off but he did not mention any injury to his back any time that evening [R. 293]. If plaintiff was going to climb on the cars he is supposed to work on the south side of the engineer's side of the cars [R. 296-297]. If Mr. Seamas had climbed on the car on the engineer's side, he could have climbed on the east end and walked over the top to release to brake and he would have been within the engine foreman's sight [R. 308]. Mahan did not see plaintiff at any time after plaintiff got off the cars at No. 9 switch until after the accident [R. 319].

Seamas had no business on the opposite side from where the signals and work were being given and handled and the foreman would not know he was going to go there unless notified [R. 322]. The foreman was unable to see the brake platform on which plaintiff was climbing because it was on west end of the car (on the

north side) and the foreman was on the east end of the car (south side) [R. 323]; nor did the foreman see any light or reflection of a light from plaintiff's lantern [R. 324].

The Court remarked that "He (the witness) is a bit hard of hearing which is quite evident to the court . . . [R. 325]." Mr. Wilson testified further that switch screws always work on the engineer's side switching cars; that that is standard practice throughout the entire railroad [R. 339]. Moreover, the foreman would expect the crew to be on the side on which he was operating, then he would know their positions at all times, unless the engine foreman gave permission to be elsewhere [R. 340].

Appellee's medical testimony disclosed a diagnosis of an acute bending sprain of the lower back, including derangement of the interverbetral disc and a slight compression fracture of the 3rd lumbar vertebra [R. 203]. The significance of the fracture was said to be an index to show the amount of force used in producing injury to the soft tissues [R. 202 and 198]. On cross-examination it was shown that an X-ray many years earlier showed the same thing that had been diagnosed as a compression fracture arising from the accident [R. 214-217]. Plaintiff suffered a nervous breakdown in 1947 [R. 218], and his apprehension about his injury was moderate [R. 218-219]. He had no muscle spasm in his back in January, 1950 [R. 221], and the doctor did not think appellee had a herniated disc and would not operate on him [R. 222].

IV.

SPECIFICATION OF ERRORS.

1. Erroneous Instruction of the Jury.

The Court gave the Jury the following instruction:

> "When a foreman gives an employee an order, either expressly or by implication, the employee has a right to assume in the absence of warning or notice to the contrary, that he would not thereby be subjected to injury." [R. 357.]

To this instruction, appellant's counsel objected at the trial as follows:

> "I believe that instruction is erroneous for the reason that what it does is to tell the jury that the employer, under the federal act, insures the safety of the employee; and for the further reason that the law is that an employee could abide by the general rule of conduct on the part of the defendant, that is, he may anticipate the defendant will exercise ordinary care toward him, and that provisal [*sic* provision?] and condition is not included in the instruction." [R. 372.]

2. Excessive Damages Appearing to Have Been Given Under the Influence of Passion or Prejudice.

V.
ARGUMENT.

1. Erroneous Instruction.

(a) Instructing the Jury That Following the Order of the Foreman Gave the Plaintiff the Right to Assume That He Would Not Be Subjected to Injury Made the Railroad Company the Insurer of His Safety and Charged Appellant With the Duty of Exercising Greater Care Than Ordinary Care and Wholly Excused Any Contributory Negligence on the Plaintiff's Part.

This instruction told the jury that if an employee is obeying an order he has the right to assume that he will not be hurt under any circumstances, provided he had no notice or warning that he would be hurt. The duty of care imposed upon appellant under the Federal Employers Liability Act is the duty to exercise ordinary care. Moreover, plaintiff does not have the right to assume "in the absence of warning or notice to the contrary" that he will not be hurt, but he must at all times exercise reasonable care for his own safety.

45 U. S. C. A., Sec. 51, *et seq.*;

Matthews v. So. Pacific Co. (1936), 15 Cal. App. 2d 36;

Atlantic Coast Line R. Co. v. Tiller, 323 U. S. 574, 89 L. Ed. 465;

Sheaf v. Mpls. St. Paul and S. S. M. R. Co., 162 F. 2d 110;

Spencer v. Atchison Topeka & Santa Fe, 92 Cal. App. 2d 490;

Tennant v. Peoria and P. U. Ry. Co., 321 U. S. 29, 88 L. Ed. 520.

Mere happening of an accident provides no basis for finding a defendant railroad liable under the F. E. L. A.

Parrett v. S. P. Co., 73 Cal. App. 2d 30.

The railroad is not an insurer of its employees' safety.

Wilkerson v. McCarthy, 336 U. S. 53, 93 L. Ed. 497.

Although the employee has the right to assume that the railroad will exercise ordinary care

Griswold v. Gardner, 155 F. 2d 333, cert. den., 329 U. S. 725, 91 L. Ed. 628;

Foxe v. S. P. Co., 121 Cal. App. 633;

no case under the F. E. L. A. holds that an employee has a right to assume he will not be subjected to injury in following an order.

The instruction complained of is incomplete in that the jury is told without qualification that the employee has a right to assume that his personal safety is guaranteed in the absence of warning or notice to the contrary. The rule is that the employee must himself exercise ordinary care and failure to do so brands him as guilty of contributory negligence which diminishes damages under the act.

Bernola v. Pennsylvania R. Co., 68 F. 2d 172;

56 C. J. S., Secs. 427 to 430, pp. 1252 to 1256.

Noted under Section 430, *supra,* is the general rule that although an employee has the right to assume that other employees will exercise ordinary care this does not absolve him from caring for his own safety.

Assuming that Foreman Mahan gave plaintiff permission to board the car on one side or the other, plaintiff's instruction 23 is tantamount to a finding by the Court as a matter of law that plaintiff was not guilty of any contributory negligence in the manner of his obedience to the order. The facts of the case do not warrant any such finding by the Court in view of Mr. Seamas' disobedience of the custom of boarding cars on the engineer's side of the train and in the absence of an assurance that the car he boarded would not be moved at all. Moreover, as an experienced switchman he was under a duty to use his eyes and ears and to exercise due care. Although some circumstances justify a finding as a matter of law that plaintiff was entitled to rely on his employer's assurance of safety and is, therefore, not himself contributorily negligent,

> *St. Louis-San Francisco Railroad Co. v. Fine,* 44 S. W. 2d 340;
>
> *Ingram v. Prairie Block Coal Co.* (Mo.), 5 S. W. 2d 413,

usually contributory negligence is a jury question.

Thus, in *Central of Georgia Railroad Company v. Lindsey,* 110 S. E. 636, the Court held that the servant must use ordinary care even though acting under direct command. In this Federal Employers' Liability Act case the Court states that plaintiff is not relieved from negligence because

> "the injury results from his obedience to such a direct and specific command, when it appears that the servant failed to exercise ordinary care, or that the risk was obvious, or that the servant knew or had equal means with the master of knowing of the un-

usual peril involved in a compliance with the command, it is, nevertheless, true that what in any given case amounts to 'ordinary care' is to be determined *by the jury* in the light of all the surrounding facts and circumstances existing at the time of injury, including the issuance of the command by the master to the servant." (Italics supplied.)

In *Wheelock, et al. v. Freiwald,* 66 F. 2d 694, the Court held that under the Federal Employers' Liability Act it was the carrier's duty to exercise ordinary care to protect a switchman in execution of orders from danger but that mere injury while doing ordinary work is not alone sufficient to impose liability. In this case he was told to "look out for the carload of lumber," boarded the car and subsequently fell therefrom.

In *Klein v. Kersey* (Mass., 1940), 29 N. E. 2d 703, plaintiff was injured when horses ran away and claimed assurance from his employer that the horses were safe. The Court held that assuming assurance of safety was given by the employer, nevertheless, the right to rely on such assurance was not absolute and that the general rule is that an assurance of safety renders the care of the workman relying upon it a question of fact in the absence of unusual cidcumstances (see p. 705).

F. W. Woolworth Co. v. Davis, 41 F. 2d 342; cert. den., 282 U. S. 859, 75 L. Ed. 760.

In this case plaintiff walked into an open elevator shaft and the Court held that assurance of safety by the master will not relieve the servant from exercising due care for his own safety.

A servant must exercise ordinary care in obeying the command or order of the master in order to be relieved

of the charge of contributory negligence, even though the order is accompanied by an assurance of safety, especially where, in obeying the command, he was doing a regular part of his ordinary duties. The question of contributory negligence is usually one for the jury.

56 C. J. S., Sec. 467, p. 1307;

P. Bannon Pipe Co. v. Moorman (Ky., 1918), 199 S. W. 802;

Van Duzen Gas and Gasoline Engine Co. v. Schelies (Sup. Ct. Ohio, 1899);

Hardy v. Chicago, R. I. & P. Ry. Co. (Iowa, 1910), 127 N. W. 1093;

Rush v. Brown (Kan., 1941), 109 P. 2d 84;

Illinois Steel Co. v. Schymanowski (Ill.), 44 N. E. 876;

Southern Co-op. Foundry Company v. Elliott (Ga., 1925), 131 S. E. 180.

Integration of Instructions.

While a mere want of accuracy in an instruction is not ground for reversal, an erroneous instruction or a material error in an instruction cannot ordinarily be cured or corrected by giving one which is contary thereto where it is impossible to tell which the jury followed. (*Kauffman v. Maier,* 94 Cal. 260; *Armour & Co. v. Russell,* 144 Fed. 614.) The rule that a charge is to be considered as a whole and that judgment will not be reversed because one paragraph may be defective, if the instructions as a series are correct, does not apply where two instructions are directly in conflict and one is erroneous and prejudicial. (*Drossos v. United States,* 2 F. 2d 538.)

(b) Excessive Damages.

Appellee's alleged injuries or damages are not sufficient to justify a verdict in the sum of $22,500.00; relief on the ground of excessive damages is addressed to the sound discretion of the Court.

S. P. Co. v. Zenkle, 163 F. 2d 453.

Conclusion.

Appellant submits that the jury was told to bring in a verdict for appellee on the mere finding that appellee was injured while carrying out an implied order of the foreman, thus making the railroad liable for any injury sustained by its employees in carrying out an order of a superior, whether or not the railroad exercised ordinary care and whether or not appellee was contributorily negligent. Thus plaintiff's safety was *insured.*

Considering the injury proved to have been sustained by plaintiff, the verdict was excessive and such as to shock the conscience of the Court as having been given under the influence of passion and prejudice.

Respectfully submitted,

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